



AN AXE TO CLIMATE ACTION

10 REASONS THE EU AND GOVERNMENTS
MUST QUIT THE ENERGY CHARTER TREATY



Friends of
the Earth
Europe

INTRODUCTION

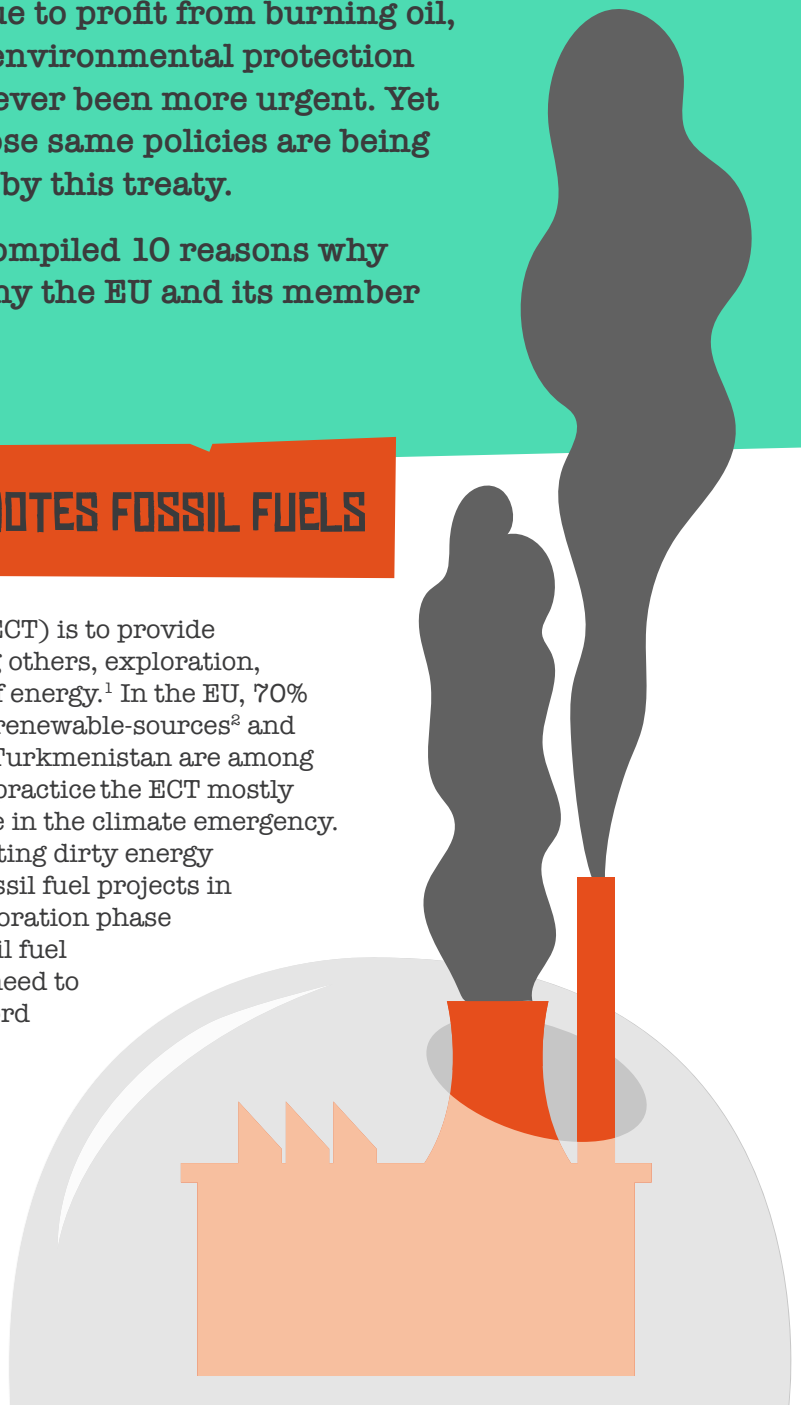
The Energy Charter Treaty (ECT) is a major obstacle to fast and effective action on the climate and environmental crisis. This little-known treaty from the 1990s, signed by 53 countries plus the EU, grants sweeping rights to big corporations. The fossil fuel industry is using it to sue governments and sabotage the energy transition. For the sake of a liveable climate, the Energy Charter Treaty should be disbanded.

Rights for corporations – such as the possibility for them to sue states for public policies that affect their economic interests – are being used by fossil fuel companies to challenge climate action, so they can continue to profit from burning oil, coal and gas. Bold climate action, environmental protection and just transition policies have never been more urgent. Yet it is not widely recognised that those same policies are being deterred, and the costs increased, by this treaty.

Friends of the Earth Europe has compiled 10 reasons why the ECT is a harmful treaty and why the EU and its member states must step out of it now.

#1 IT PROTECTS AND PROMOTES FOSSIL FUELS

The purpose of the Energy Charter Treaty (ECT) is to provide protection for investments related to, among others, exploration, extraction, refining, storage and transport of energy.¹ In the EU, 70% of the energy produced originates from non-renewable-sources² and other ECT members such as Kazakhstan or Turkmenistan are among the world's top fossil fuels producers.³ So in practice the ECT mostly protects fossil fuels – despite their major role in the climate emergency. The ECT acts to help preserve already-operating dirty energy facilities. Moreover, it even promotes new fossil fuel projects in development, as the treaty protects the exploration phase of investments. The vast majority of the fossil fuel industry's known coal, gas and oil reserves need to stay in the ground⁴ – the climate cannot afford for these assets, let alone new projects, to be exploited or promoted.



#2 IT HELPS THE FOSSIL FUEL INDUSTRY UNDERMINE CLIMATE ACTION

The cornerstone of the protection of investments under the ECT is the investor-state dispute settlement mechanism (ISDS). ISDS allows investors to sue states when they consider that a piece of legislation, court ruling or action violates their rights as investors and impinges on their economic interests. These corporate lawsuits take place before an international tribunal of business-friendly arbitrators, who can order governments to pay up to billions of euros to compensate the company. If a country passes a law to phase out burning coal or forbid new mining or drilling projects, then a corporation involved in these activities can file a claim and be awarded. Sounds like science-fiction? It is already happening! 128 ISDS cases are known to have been filed under the ECT⁵, which makes it the most utilised trade treaty for such arbitrations. As of early 2020, governments had been ordered or agreed to pay \$52 billion of public money, and \$32 billion were still at stake in pending cases.⁶ But filing an official case before a tribunal is not the only way to pressure governments: just the threat alone is sometimes enough to scare off policy-makers. The ECT is an ever-present Sword of Damocles hanging over regulators' heads, causing what some have termed a "regulatory chill" – deterring, watering down or abandoning climate action out of fear of being sued for billions of euros (cf. Box 1).



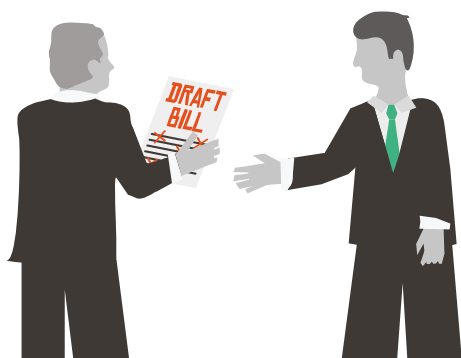
BOX 1 – NOTORIOUS THREATS OF COMPLAINTS BY ENERGY COMPANIES AGAINST STATES FOR CLIMATE ACTION

Vermilion vs. France⁷

In 2017, French Environment Minister Nicolas Hulot drafted a law to end fossil fuel exploration and extraction on all French territory by 2040. This first text would have allowed a progressive phase-out, as it forbade new exploration permits from being delivered and exploitation permits from being renewed. This plan didn't please Canadian energy company Vermilion: they hired a law firm to send a lobby letter to the French Council of State, the institution providing the government with a legal opinion on the bill before its discussion in Parliament. Vermilion argued the proposal violated their rights as investors under the ECT and threatened to sue France before ISDS courts. Following these pressures, the government backed up: the final law was then modified, allowing for oil exploitation permits to continue being renewed until 2040, and even after under certain conditions.⁸

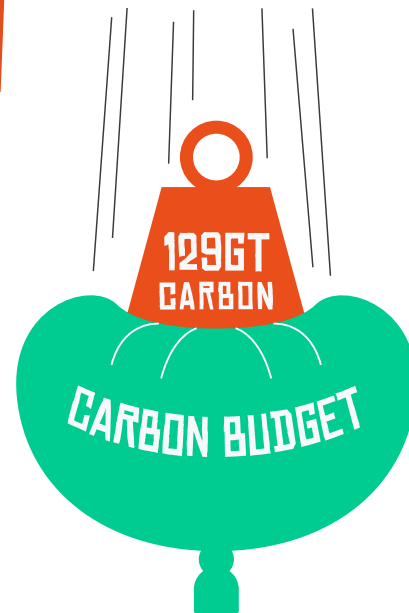
Uniper vs. The Netherlands

The Netherlands currently faces an ECT threat for phasing out dirty coal power. German energy company Uniper (soon to be majority-owned by the Finnish state energy company Fortum) announced their intention to file a complaint over a law, passed by the Dutch Parliament in December 2019, to prohibit coal power generation by 2030. This law will de facto bar Uniper from burning coal in its Maasvlakte 3 power plant inaugurated in 2016. Uniper argues this violates its expectations for a stable investment climate, and it claims compensation of up to €1 billion.⁹ In fact, the Dutch law is a legitimate and important regulation in the public interest¹⁰ and Uniper was well aware of the risks of investing in coal-fired electricity generation at the time of commissioning its new plant.



#3 IT HAS NO BINDING CLIMATE OBJECTIVES

A relic from the 1990s, the ECT doesn't contain any binding targets or objectives to reduce greenhouse gas emissions or address the climate emergency. Nor is this proposed in ongoing negotiations to reform the treaty. At best, the EU suggests that the modernised ECT should "contribute to the achievement of the objectives of the Paris Agreement".¹¹ This proposal is strikingly vague wording, considering the severe impact of the ECT on the climate crisis. Fossil fuel activities protected by the ECT regime are estimated to have emitted 87 Gt of carbon from 1998 to 2019 and are expected to release a further 129 Gt by 2050.¹² This would take up 22% of the remaining global carbon budget set by the IPCC to keep global warming below +1.5°C.¹³

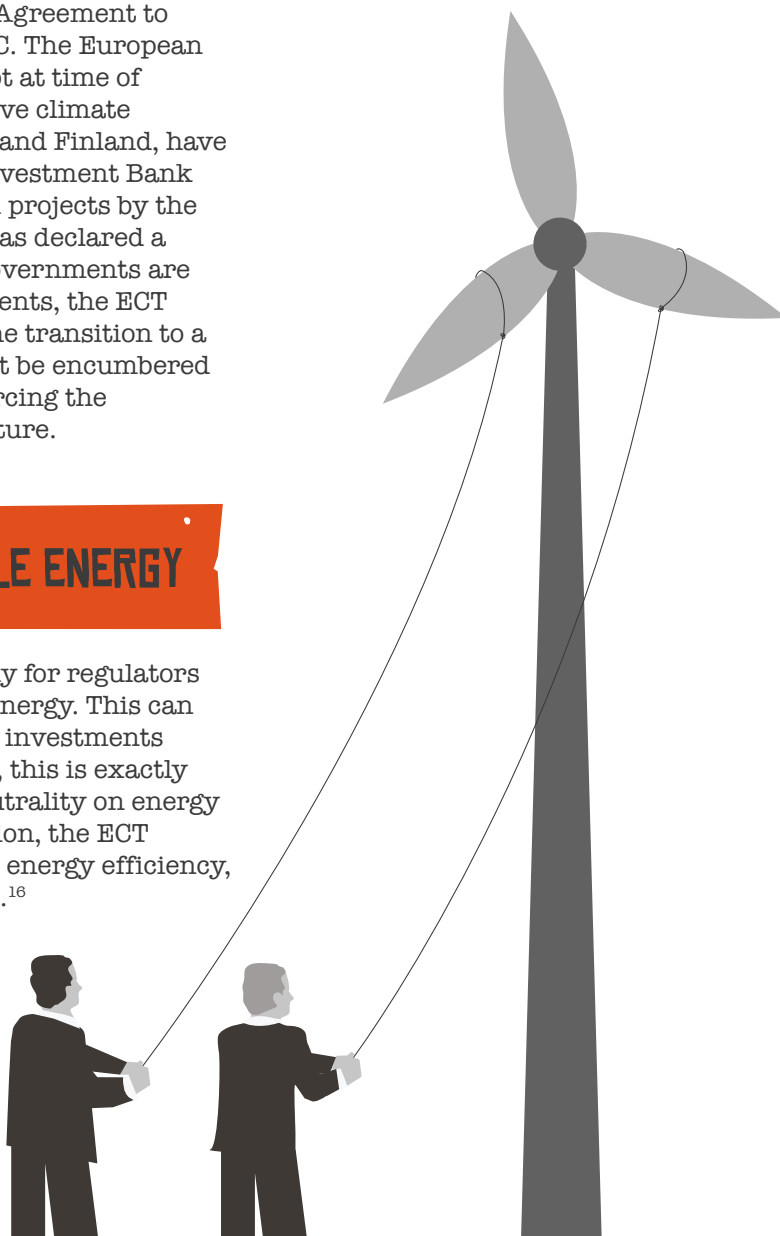


#4 IT IS NOT COMPATIBLE WITH EU AND GOVERNMENTS' COMMITMENTS

Political leaders have committed in the Paris Agreement to pursue efforts to limit global warming to 1.5°C. The European Commission and all EU Member States (except at time of writing Poland) support the objective to achieve climate neutrality by 2050 – while a few, like Sweden and Finland, have adopted earlier target dates. The European Investment Bank (EIB) plans to stop investing in new fossil fuel projects by the end of 2021¹⁴; and the European Parliament has declared a 'climate emergency'. If the EU and national governments are serious about meeting their climate commitments, the ECT stands in their way. They need to fast-track the transition to a 100% renewable fossil-free society, and cannot be encumbered by the ECT putting a spoke in their wheels, forcing the protection of existing fossil energy infrastructure.

#5 IT CAN HINDER RENEWABLE ENERGY

The ECT makes it difficult and financially risky for regulators to discriminate between different sources of energy. This can deter governments from favouring renewable investments at the expense of carbon-intensive ones.¹⁵ Yet, this is exactly what is necessary for a fossil free Europe. Neutrality on energy sources is an option we can ill afford. In addition, the ECT neither protects much-needed investments in energy efficiency, nor other measures to reduce energy demand.¹⁶



BOX 2 : BUSTING THE MYTH THAT THE ECT CAN WORK FOR THE ENERGY TRANSITION

The fossil fuel and arbitration industries use a number of disputes triggered by renewable energy-related companies as evidence to claim the ECT helps combat climate change. A few investors in the field of renewable energy have indeed used the ECT to sue states the same way fossil fuel companies do. They triggered 47 disputes against Spain over the country's cuts to support schemes for renewable energy. When one looks more closely at the entities behind the disputes, they turn out to be financial investors such as private equity funds in 85% of the cases.¹⁷ Most are not interested in the development of renewable energies; rather they have made a profitable business out of arbitration. Moreover the energy transition requires proactive promotion of renewables, not just an equal footing for all foreign investments (see point 5). Finally, biased and secretive ISDS tribunals are not an appropriate mechanism to help advance the struggle against the climate crisis.

#6 IT OBSTRUCTS ENVIRONMENTAL PROTECTION

The fossil fuel industry also uses the ECT to challenge measures taken to protect the environment and communities from harmful corporate projects (cf. Box 3). This is a worrying trend, as such policies are urgently needed to prevent ecosystem breakdown.¹⁸ The EU Charter of Fundamental Rights commits the EU and member states to “a high level of environmental protection [...] in the policies of the Union”¹⁹. It is hardly conceivable that investors can use parallel, secretive tribunals under the ECT to undercut these core principles of EU law.

BOX 3 : NOTORIOUS THREATS OF COMPLAINTS OR COMPLAINTS BY ENERGY COMPANIES AGAINST STATES FOR ENVIRONMENTAL ACTION

Vattenfall vs. Germany (twice)²⁰

In 2009, Swedish energy multinational Vattenfall sued Germany, seeking €1.4 billion in compensation for environmental standards imposed on a coal-fired power plant near Hamburg. The case was settled after the city government agreed to relax the environmental requirements. In 2012, Vattenfall did it again. The company claimed more than €6.1 billion for lost profits related to two of its nuclear power plants. Vattenfall claims its projects were frustrated by the democratic decision of the German Parliament to accelerate the phase-out of nuclear energy after the 2011 Fukushima disaster. The case is still pending.

Rockhopper vs. Italy²¹

In 2015, the Italian Parliament approved a ban on new oil and gas projects near the Italian coast. The new legislation outlawed a number of fossil fuels projects, including the Ombrina Mare oil platform, licensed to energy company Rockhopper. In 2017, Rockhopper challenged Italy's refusal to grant the concession in an arbitration tribunal. Their claim is admissible even though Italy withdrew from the ECT on 1st of January 2016. (The ECT features a “survival clause” allowing corporate privileges to live on for another 20 years after a country withdraws). The case is still pending.

Aura vs. Sweden:

In 2019, Australian mining company Aura lodged a compensation demand against Sweden after the country decided to ban Uranium mining. The new legislation also outlawed permits to explore or exploit uranium deposits. This law, stemming from concerns over environmental protection, thwarts Aura's perspectives of profits: the project was ranked in “the top 5 undeveloped uranium resources in the world”.²² Aura estimates the loss of investment made plus the capital gains they are unable to realize as a result of the measure at \$1, 8 billion.²³

Ascent Resources vs. Slovenia

UK-based oil and gas company Ascent Resources is threatening to claim €50 million in damages from Slovenia.²⁴ They allege the country is taking too long to issue a permit for the exploitation of the Petišovci gas field.²⁵ Slovenian authorities are concerned about the environmental impacts of fracking.²⁶ Friends of the Earth Slovenia and 16 other civil society organisations have filed an OECD complaint²⁷ against Ascent Resources in November 2019, accusing the company of violating the OECD Guidelines for multinational enterprises in relation to environmental and health hazards as well as lack of due diligence.

#7 IT MAKES TAXPAYERS PAY FOR THE COSTS OF BIG POLLUTERS

Achieving a 100% renewable fossil free Europe is a daunting challenge that will require big changes to regulations and laws. If governments end up having to financially compensate investors every time a piece of legislation is modified, public money will be diverted from funding the just transition for workers and communities. The ECT diverts public money from where it is really needed – e.g. the EU's Just transition fund would need at least a tenfold increase²⁸ – to bailing out dirty energy corporations. The ECT even allows companies to claim compensation against future profits they claim they would have earned. There is no reason why taxpayers should have to compensate oil, coal or gas majors for their decisions to bet their money on projects that will increasingly become stranded assets: those majors have been aware of the threat of climate change for decades.²⁹

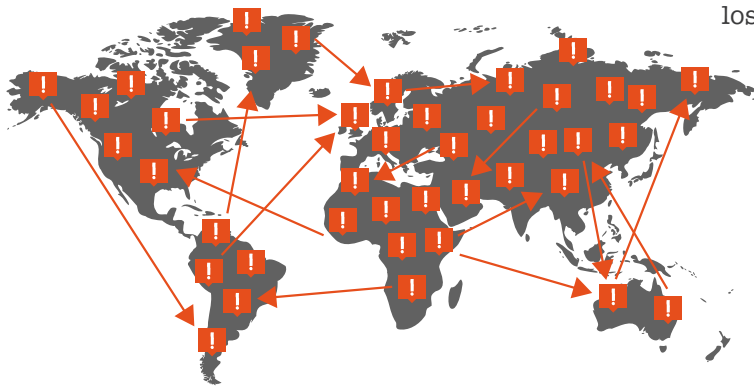
#8 IT IS AN OBSTACLE TO A JUST TRANSITION AND A DEMOCRATICALLY CONTROLLED ENERGY SYSTEM

The rapid transformation of our energy system must work for people and communities. This means that the most vulnerable in society are not hit with higher costs, and measures are taken to mitigate the impact. The ECT goes in the exact opposite direction. In the past, investors have used the ECT to challenge governments' decisions to regulate energy prices in order to keep electricity and heating affordable for people.³⁰ Meanwhile, energy poverty is a plague: 41 million Europeans cannot afford to keep their homes warm in winter.³¹ For the just transition to work, we also need to switch to a democratically controlled, people and community-owned energy system. In the short-term, this implies reversing the trend of (failed) privatisations of energy companies and taking energy facilities and distribution networks back into municipal and public hands. Yet again, the ECT is a challenge to such measures. For example, Czech energy company ČEZ triggered an investor-state dispute after Albania revoked its electricity distribution license.³² Experts say more such disputes can be expected in future.



#9 IT WILL EXPORT A DIRTY ENERGY MODEL WORLDWIDE

For years, the secretariat of the ECT has pushed to expand the ECT to new countries in Africa, Asia and Latin America. 33 countries are currently at different stages of the accession procedure,³³ some like Burundi or Mauritania are far advanced. This expansion policy is particularly worrying as it will lock many more governments into a flawed corporate energy model where fossil fuels investors are given disproportionate rights and polluting industries encouraged. If these countries were to accede the ECT, it would expose them to costly lawsuits triggered by investors. At the time of writing, the expansion policy has been put on hold, but exporting this dirty energy model remains a core objective of the ECT.



#10 REFORM IS DOOMED TO FAIL

The EU and the ECT Secretariat have proposed a reform of the ECT. But this so-called ‘modernisation’ does not envision an end to protecting fossil fuels investors, nor scrapping the ISDS mechanism. Binding targets to address the climate emergency or protect the environment are not on the agenda either. Negotiations will take several years, and focus on weak amendments to the treaty that are far from enough to repair it. Moreover, even this superficial reform is not guaranteed to see the light of day: any amendment to the treaty requires a unanimous decision of all members. But member governments have quite diverging views and interests: some Central Asian countries draw a significant part of their income from fossil fuel production. Japan has already made clear it opposes any changes. Engaging in these doomed reforms will lose vital time that we do not have.³⁴

CONCLUSION:

The Energy Charter Treaty is taking an axe to climate action. It belongs in the past. It is difficult to imagine how a revision could fix a flawed treaty created for the era of fossil fuels. The reform will be a lengthy, insufficient and difficult road; yet, phasing out fossil fuels is overdue now. The impacts of unprecedented climate chaos and environmental devastation are being felt now by communities around the world. This is no time to be relaxed about a treaty that does nothing to foster the energy transition, but rather reduces the ability of governments to take bold and urgent action in the public interest. 278 civil society organisations and trade unions are demanding³⁵ that governments either exit or jointly terminate the Treaty. Activists concerned about the climate emergency cannot afford to ignore the ECT. Governments serious about the energy transition will pay a high price if they do not junk it now.

ENDNOTES

- 1 According to the Energy Charter Treaty, "Economic Activity in the Energy Sector means an economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of Energy Materials and Products except those included in Annex II, or concerning the distribution of heat to multiple premises"
Consolidated Energy Charter Treaty with related documents, last updated 16 January 2016, Part I, Article 1 "Definitions", §5, p.40. <https://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf>
- 2 "EU Energy in figures. Statistical Pocketbook 2019", p. 38
https://op.europa.eu/en/publication-detail/-/publication/e0544b72-db53-11e9-9c4e-01aa75ed71a1/language-en?WT.mc_id=Searchresult&WT.ria_c=37085&WT.ria_f=3608&WT.ria_ev=search
- 3 Kazakhstan is among the top 10 countries in terms of coal production and coal reserves
<https://www.eia.gov/international/analysis/country/KAZ/background#coal>
Turkmenistan is among the top 15 natural gas producers and the 8th largest natural gas resource holder in the world. <https://www.eia.gov/international/analysis/country/TKM>
- 4 Oil Change International in collaboration with 14 organizations, "The sky's limit: why the Paris climate goals require a managed decline of fossil fuel production, 2016. <http://priceofoil.org/2016/09/22/the-sky-limit-report>
- 5 Disputing parties are neither under an obligation to make a dispute public nor to notify the ECT secretariat. Given this opacity, the actual number of cases might be much higher.
- 6 Corporate Europe Observatory, Transnational Institute, "Energy Charter Treaty's dirty secrets" website, last updated December 2019 [June 2018]. <https://www.energy-charter-dirty-secrets.org/>
These numbers only take into account the awards ordered by the first arbitration tribunals. They do not take into account possible changes in the awards following annulment proceedings.
- 7 FOEE, FOEI, CEO, TNI, "10 ISDS stories" website, case 6: "Blocking climate change laws with ISDS threats. Vermilion vs France. <http://10isdstories.org/cases/case5/>
- 8 Even though it is impossible to know the exact level of influence this ISDS threat from Vermilion had in watering down the Hulot law, it certainly played a big role alongside lobbying from other fossil fuel companies.
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- 11 Council of the European Union, Negotiating Directives for the Modernisation of the Energy Charter Treaty - Adoption, 2 July 2019
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- 12 OpenExp, Modernisation of the Energy Charter Treaty. A global tragedy at high costs for taxpayers, February 2019, p. 4, 46.
https://www.openexp.eu/sites/default/files/publication/files/modernisation_of_the_energy_charter_treaty_a_global_tragedy_at_a_high_cost_for_taxpayers-final.pdf
- 13 IPCC, Mitigation pathways compatible with 1.5°C in the context of sustainable development, 2018
https://www.ipcc.ch/site/assets/uploads/sites/2/2019/02/SR15_Chapter2_Low_Res.pdf
- 14 The EIB's new energy lending policy commits the bank to stop approving new lending to fossil fuel projects by the end of 2021. However, this contains some exceptions in particular for combined heat and power plants. <https://www.counter-balance.org/joint-letter-elp-eib/>
- 15 In the ECT's non-discrimination clause (art. 10(7)) states promise to accord investments of ECT member states treatment no less favourable than that accorded to investors of the host state or any third state. While no such lawsuits are known to date, this could lead to ECT claims against policy measures that deliberately distinguish between energy investments that advance climate change mitigation objectives and those that hinder their achievement.
See: Nathalie Bernasconi-Osterwalder and Martin Dietrich Brauch, "Redesigning the Energy Charter Treaty to Advance the Low-Carbon Transition", Transnational Dispute Management, February 2019
- 16 Sarah Keay-Bright, "Outdated Energy Charter Treaty leaves new economy investments unprotected", Energy Post, 6 March 2019. <https://energypost.eu/outdated-energy-charter-treaty-leaves-new-economy-investments-unprotected/>
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<https://fra.europa.eu/en/charterpedia/article/37-environmental-protection>
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See also: FOEE, FOEI, CEO, TNI, Red carpets courts. 10 stories how the rich and powerful hijacked justice, June 2019. <http://10isdstories.org/wp-content/uploads/2019/06/red-carpet-courts-WEB.pdf>

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